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NO. 90-50

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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The Honorable Ellis Gregory, Jr., and
The Honorable Anthony P. Nugent, Jr.,
Petitioners,

vs.

The Honorable John D. Ashcroft,
Respondent.

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## BRIEF OF AMICUS CURIAE
## The Honorable John W. Keefe
## In Support Of Petitioners

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## I. MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Honorable John W. Keefe hereby moves, pursuant to S. Ct. Rules 37 and 21, for permission to file the attached brief. Judge Keefe is personally interested in the resolution of this case and its constitutional implications as he is currently prevented from placement of his name on the ballot for elective judicial office in Ohio solely because of his age. The resolution of this case, and particularly the standard of review used to decide this case, and its implications for denial of ballot access, will impact the constitutionality of mandatory retirement laws for judges in many states, including Ohio.

Counsel for both petitioners and respondent orally consented to the filing of this brief and its discussion of the proper standard of review on January 3, 1991. The written consent of petitioners has been obtained. Appendix A. As yet, respondent's written consent has not been received. We file this motion because of the rapidly approaching filing deadline.

Respectfully submitted,


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## II. NATURE OF INTERESTS OF AMICUS CURIAE

The Honorable John W. Keefe has been a judge serving the courts in Ohio for thirty-seven years.[1] On October 2, 1985, as he approached the expiration of his term as judge of the First District Court of Appeals, his attempt to have his name placed on the ballot for re-election was rejected by the county board of elections based solely on the fact that he was seventy years old and would be unable to qualify for office under section 6(c), Article IV of the Ohio Constitution. That provision

[1] Judge Keefe is presently serving as a senior "assigned" judge by appointment of and at the pleasure of the Chief Justice of the Ohio Supreme Court in the trial and appellate courts of Ohio.

states in relevant part: "No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. * * *" In Ohio all judicial offices are elective, except for the filling of vacancies prior to special elections or for the temporary assignment of senior judges.

Judge Keefe's mandamus action in the Ohio Supreme Court was unsuccessful in its attempt to compel the county board of elections to place his name on the ballot. *State, Ex Rel. Keefe* v. *Eyrich*, 22 Ohio St.3d 164, 489 N.E.2d 259 (1986). Several of Ohio's justices opined that the standard of constitutional review for the challenged law should be strict scrutiny because it affected the fundamental right to vote and the right of access to the ballot. *Id.* at 179-86, 489 N.E.2d at 271-76.

In his separate concurring opinion Justice Brown invited guidance from this Court on the proper standard of review, as follows:

> The United States Supreme Court has handed down a line of decisions which I believe at least arguably imply that the age-seventy provision at bar offends the federal Constitution. These cases involve the right to vote and the right of access to the ballot,
> * * *
> the strict scrutiny standard may be called for, requiring the state to demonstrate that the limitation is necessary to achieve some compelling state interest.
> * * *
> It is evident from the foregoing that the case at bar presents a multitude of difficult constitutional questions as yet unresolved by this nation's highest court. I look forward with interest to the possibility of more specific guidance from that quarter.

*Id.* at 171-74, 489 N.E.2d at 265-7.



Since 1985 Judge Keefe's access to the ballot has been roadblocked.

In the case *sub judice* Missouri's challenged mandatory retirement provision of the Missouri Constitution affects both appointed judges under the Missouri Non-Partisan Court Plan (Mo. Const. Art. V, § 25(c)(1)) and elected circuit judges (Mo. Rev. Stat. § 478.010). Judge Keefe supports the petitioners' constitutional challenge to Missouri's mandatory retirement provision.

## III. RELEVANT QUESTION OF LAW NOT ADEQUATELY PRESENTED

Discussion of the proper standard of review for the petitioner's constitutional challenge is not expected to be adequately presented. The main thrusts of petitioner's challenges are: The application of the Age Discrimination in Employment Act to appointed judges; and violation of the equal protection clause and due process requirements under the fourteenth amendment to the United States Constitution even under a rational basis review. Because the effect of such mandatory retirement laws is to inhibit access to the ballots, and to limit voting rights, the proper standard of review should be strict scrutiny.

Although the named petitioners are both appointed under the Non-Partisan Plan, the challenged law also applies to Missouri judges elected in partisan, general elections, such as Judge Flake L. McHaney, a plaintiff below. Furthermore, even appointed judges must face retention elections. The resolution of the constitutional issues in this case, therefore, will directly bear upon the mandatory retirement laws for judges of other states, such as Ohio, which laws expressly prohibit election to judicial office of elder candidates regardless of their abilities or qualifications.

## IV. ARGUMENT

### THE STANDARD OF REVIEW FOR LAWS REQUIRING MANDATORY RETIREMENT FOR JUDGES WHICH INHIBIT ACCESS TO BALLOTS AND INHIBIT VOTING RIGHTS SHOULD BE STRICT SCRUTINY.

It is well established that the right to vote is a fundamental right requiring a higher standard of review. *See, e.g., Reynolds* v. *Sims*, 388 U.S. 533 (1964). *William* v. *Rhodes*, 393 U.S. 23 (1968).

In *Bullock* v. *Carter*, 405 U.S. 134 (1972), this Court struck down a Texas law requiring substantial filing fees for candidates. The requirement was found "patently exclusionary", precluding some candidates from the ballot regardless of qualifications and popular support. This Court held that the effect on voters was neither incidental nor remote. *Id.* at 143-44. This Court held that the strict scrutiny standard was appropriate, and that the state must demonstrate the necessity of the limitation to a compelling state interest. *Id.* at 147.

Similarly, a law preventing access to the ballot for a popular seventy year old jurist has a real effect upon the candidate, his supporters and upon the voters, and the strict scrutiny standard should be employed. The candidate, his supporters, and the electorate are all entitled to protection of their rights. As Chief Justice Burger wrote for the Court: "laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.* at 143. This sentiment was repeated, in *Lubin* v. *Parish*, 415 U.S. 709 (1974), where this Court emphasized that both the candidate's and the voters' interests are entitled to protection and that their interests can not be unfairly or unnecessarily burdened.

In *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441 (1974), this Court further noted that access to the ballot, interests in casting an effective vote and interests in running for office are protected by the First Amendment's freedom of



association, requiring a strict scrutiny of laws impinging thereon. *Id.* at 449. In a similar fashion, the challenged laws, which impede access to the ballots and voting rights, impinge upon the freedom of association and also require strict scrutiny.

Where a state intends to restrict access to the ballot, the restriction must be necessary for the achievement of some compelling state interest and the state must use the least drastic means to achieve that state interest. *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184-5 (1979). This Court has stated that:

> By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences . . . voting is of the most fundamental significance under our constitutional structure * * * When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest
> * * *
> and we have required that States adopt the least drastic means to achieve their ends. *Id.* (Citations omitted).

The guidelines for constitutional review of candidate restrictions were set forth in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983). This Court instructed the courts of this land 'o consider the injury to the right protected "by the First and Fourteenth Amendments", then to "identify and evaluate the *precise* interests put forward by the State as justifications for the burden imposed by its rule", and then "determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 789 (emphasis added).

Older people in private and public office are demonstrating their abilities admirably throughout the nation well beyond age seventy. Age seventy is not a reliable indicator of feeblemindedness. With the maturing of our national population,

more candidates and voters are being disenfranchised by laws which proscribe election of septuagenarian judges.

For the reasons stated by petitioners Missouri's challenged law is not necessary to promote any articulated compelling state interest, is not drafted in the least drastic means and cannot withstand strict scrutiny. Similarly, mandatory retirement laws for judges in other states where the right to vote and access to the ballot are affected, such as in Ohio, cannot withstand strict constitutional scrutiny.

## V. CONCLUSION

Because the challenged laws impede access to the ballots and restrict voters' rights, the proper standard of review is strict scrutiny to determine whether they run afoul of the First and Fourteenth Amendments to the United States Constitution.

As the challenged laws are not necessary to protect any precisely articulated compelling state interest, nor are they narrowly tailored, they should be declared unconstitutional.

Dated this 9th day of January, 1991.

Respectfully Submitted,

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## APPENDIX A

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January 3, 1991

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Re: *Gregory* v. *Ashcroft*, No. 90-50

Dear Mr. Spraul:

This is to confirm our conversation today wherein I consented to your request to file an amicus brief in *Gregory* v. *Ashcroft*, No. 90-50. I appreciate your interest in the case and hope that your brief will be well received.

Very truly yours,

GUILFOIL PETZALL & SHOEMAKE

/s/ BRUCE D. LIVINGSTON
Bruce D. Livingston

BDL:jek